Supreme Court, U.S.
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No. 94-1657

In The

Supreme Court of the United States

October Term, 1994

MICHAEL HOGUE and CAROL HOGUE,

Petitioners,

vs.

UNITED OLYMPIC LIFE INSURANCE COMPANY, DELAWARE ADMINISTRATORS, and CONSULTANTS & ADMINISTRATORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

Petitioners: Michael Hogue and Carol Hogue

Respondents: United Olympic Life Insurance Company, Delaware Administrators, and Consultants & Administrators, Inc.[1]

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[1] Pursuant to Sup. Ct. R. 15.2 and 29.1, Respondents certify that United Olympic Life Insurance Company merged into United Services Life Insurance Company ("USLICO"), and USLICO's parent company is Northwestern National Life Insurance Company, which is wholly owned by Reliastar Financial Corp. ("Reliastar"). Reliastar has several subsidiary corporations, all of which it wholly owns other than NWNL Northstar, Inc., a Delaware corporation, and Select Care Health Network, a California corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents United Olympic Life Insurance Company ("United Olympic"), Delaware Administrators, and Consultants & Administrators, Inc. ("C&A") (collectively, "Respondents") request that this Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on December 7, 1994.

STATEMENT OF THE CASE

This is a diversity case decided under Texas law. By way of factual background, Petitioners were insured from November 1, 1989, to January 31, 1991, under a group insurance policy issued by United Olympic to a trust. The trust was established several years earlier for small group employers, ranging from 2 to 50 employees, that would apply for participation in the trust and, if accepted, would obtain group insurance coverage for their eligible employees under the group policy.

Prior to Petitioners' coverage with United Olympic, they had group insurance coverage through two other companies, G.I.C. Insurance Company ("G.I.C.") and George Washington Life Insurance Company ("George Washington"). G.I.C. went bankrupt in the summer of 1989 and George Washington assumed the group coverage. George Washington subsequently notified its insureds, including Petitioners, that it would not provide coverage after October 31, 1989. United Olympic then assumed the entire block of business previously insured by George Washington effective November 1, 1989. Petitioners played no role and had no involvement in the assumption of business by United Olympic. Sometime after November 1, 1989, Petitioners received their group certificate booklet. Michael Hogue was diagnosed with cancer prior to the time United Olympic began providing group coverage.

While insured under the United Olympic group policy, notice was given to Petitioners as well as the other insureds that premiums would be increasing under the policy and certain benefits would be reduced. These

measures were taken in an effort to contain costs and to curtail exorbitant claims submitted under the block of business as a whole. The measures were based on sound actuarial principles and had nothing to do with the characteristics of any particular individual insured under the group policy. Prior to the implementation of the premium increase and benefit change, Petitioners' coverage lapsed on January 31, 1991, for non-payment of premium, and they subsequently obtained other insurance coverage. Despite the cost containment measures instituted by United Olympic, the group policy was ultimately terminated in its entirety on March 31, 1992, because United Olympic suffered devastating losses under the block of business.[2] Petitioners correctly concede that United Olympic had the right to terminate the group policy in its entirety. Incidentally, United Olympic has not offered health insurance since that time.

There is no dispute that United Olympic paid all of Petitioners' claims while they were covered by the group policy, and Michael Hogue's cancer was in remission at the time Petitioners let their coverage lapse for non-payment of premium. Further, even had Petitioners remained insured until the termination of the entire group policy, their medical expenses were less than the premiums they would have had to pay, even without the rate increase.

By way of procedural background, on August 11, 1992, Petitioners filed their original petition in state court,

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[2] C&A was the managing third-party administrator of the group policy until January 1992, and Delaware Administrators assumed that role until the termination of the group policy.

naming as defendants Respondents and Risk Funding Alternatives ("RFA"). Petitioners did not request a jury trial in state court. The Petitioners alleged that Respondents and RFA discriminated against them in the amount of premiums charged and constructively terminated their insurance coverage, and also alleged various other state statutory and common law claims. On September 18, 1992, all defendants removed the case to the United States District Court for the Eastern District of Texas, Tyler Division (the "Trial Court"), on the basis of ERISA preemption. Prior to removal, the Petitioners had voluntarily nonsuited their claims against the only Texas defendant, RFA.[3] However, neither Respondents nor RFA received notice of the nonsuit until after the original notice of removal had been filed. On October 6, 1992, Respondents filed a supplemental notice of removal alleging diversity jurisdiction because of the dismissal of the only Texas defendant. Also on October 6, 1992, Petitioners filed a jury demand.[4] On October 29, 1992, the Petitioners' motion to remand was denied based on the existence of diversity jurisdiction. Petitioners do not dispute the existence of diversity jurisdiction.

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[3] Petitioners filed a notice of nonsuit under Tex. R. Civ. P. 162 which acts to automatically dismiss the claims against the nonsuited party.

[4] Since Petitioners filed their jury demand on the same day that Respondents filed their supplemental notice of removal, the Petitioners' argument that they failed to file a jury demand earlier because they relied on the alleged defective original removal grounds is disingenuous because Petitioners did not receive the supplemental removal notice until October 8, 1992. In other words, Petitioners had no knowledge of the supplemental notice of removal when they filed their jury demand.

On December 14, 1992, Respondents filed a motion to strike the jury demand. The Petitioners filed a cursory response, without supporting authority, arguing that their jury demand was timely because it was filed within ten days of the supplemental notice of removal and under state law practice they would have been entitled to request a jury up to thirty days before trial. These were the only arguments ever raised by Petitioners in the Trial Court regarding their right to a jury. On January 27, 1993, the Trial Court granted Respondents' motion to strike the Petitioners' jury demand, rejecting the Petitioners' arguments as without merit. The Petitioners never again raised any issue regarding their alleged right to a jury with the Trial Court, but rather participated in a bench trial without objection, submitting proposed findings of fact and conclusions of law to the Trial Court after the trial and filing a motion for new trial which did not mention the jury demand issue.

After a two-day trial and extensive post-trial briefing, the Trial Court found that Petitioners should take nothing by way of their lawsuit. Petitioners then appealed certain portions of the decision to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). On appeal, Petitioners argued, for the first time, that their jury demand was improperly stricken because it was filed within ten days of Respondents' answer (as opposed to within ten days of the supplemental notice of removal). Respondents argued that, notwithstanding that the point of error lacked merit, Petitioners' failure to raise that argument in the Trial Court and participation in the bench trial without objection resulted in a waiver of their right to complain on appeal. Further, Respondents argued

that, even assuming that the Trial Court erroneously denied a jury trial, which it did not, the denial was harmless error since the case could have been disposed of by a directed verdict. As reflected in the Fifth Circuit's opinion, it determined that the Trial Court reached the correct result under Texas law and that no error was committed in the Trial Court's denial of the Petitioners' jury demand. Accordingly, the Trial Court's judgment was affirmed.

REASONS FOR DENYING WRIT

This is a diversity case decided under Texas law. The Petition presents nine questions, seven of which directly involve the interpretation of Texas law. As demonstrated below, the remaining two questions which facially appear to relate to federal law also involve interpreting Texas law and, moreover, were not addressed by the Fifth Circuit in reaching its decision since resolution of the questions was not necessary to the outcome of the case. For these reasons, more fully expanded upon below, the Petition for Writ of Certiorari should be denied.

1. Majority of Questions Presented By Petitioners Deal With State Law

Question numbers 3 through 9 asserted by Petitioners deal with the interpretation of state law. Throughout the Petition, Petitioners argue that the Courts below misapplied various provisions of the Texas Insurance Code and the Texas Business and Commerce Code. *See* Petition pp. 11-19. As this Court stated in *Huddleston v.*

Dwyer, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Id.*; *see also Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). In the present case, Petitioners bring seven questions involving Texas law, yet do not show that the Fifth Circuit's application of Texas state law is contrary to Texas state court decisions addressing the same issues. *See* Sup. Ct. R. 10 (identifying the character of reasons governing review on writ of certiorari).

For example, Petitioners argue that the Fifth Circuit failed to follow *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278 (Tex. 1994), regarding the duty of good faith and fair dealing. The decision in *Union Bankers*, however, has no application to the facts of this case. *Union Bankers* involved an insurance company's decision to rescind coverage. In the present case, the Petitioners' coverage was cancelled for failure to pay premiums. Further, the Trial Court determined that the Petitioners failed to establish that their coverage had been constructively cancelled, and the Petitioners did not challenge that finding on appeal to the Fifth Circuit. Accordingly, the Fifth Circuit merely made the uncontroversial determination that an insurance company does not breach the duty of good faith and fair dealing by refusing to pay claims which were incurred after the policy lapsed for non-payment of premium. Similarly, with respect to whether "puffing" is an actionable misrepresentation under the Texas Deceptive Trade Practices Act ("DTPA"), Petitioners concede

that one Texas court of appeals has held, consistent with the Fifth Circuit's opinion in this case, that "puffing" is not actionable under the DTPA. *See Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459 (Tex. App. – Dallas 1990, writ denied). Simply because the Texas Supreme Court refused to express an opinion on the issue does not mean that the Fifth Circuit has strayed from properly applying Texas law. Finally, with respect to the remaining questions presented which relate to the proper interpretation of various Texas statutes, Petitioners fail to cite any Texas authority inconsistent with the Fifth Circuit's interpretation of the Texas statutes at issue. In sum, the seven questions of Texas law set forth in the Petition are simply not appropriate for review by this Court.

2. The Remaining Jury Demand Issues Are Not Properly Presented For Review

Petitioners present two questions involving the calculation of time for filing a jury demand in a removed case. However, neither of these questions was addressed by the Fifth Circuit in reaching its decision. This is not surprising for several reasons. First, Petitioners failed to raise the questions with the Trial Court. As noted by the Fifth Circuit in its opinion, "an issue not raised in the district court will not be considered on appeal unless the issue can be resolved as a matter of law and unless failure to do so would result in grave injustice." Petition, A-8. Second, as Respondents argued to the Fifth Circuit, the Petitioners waived their right to a jury by, among other things, participating in a bench trial without objection. *See White v. McGinnis*, 903 F.2d 699, 703 (9th Cir.) (en

banc), *cert. denied*, 498 U.S. 903 (1990); *Southland Reship, Inc. v. Flegel*, 534 F.2d 639, 644-45 (5th Cir. 1976). Finally, as Respondents also argued to the Fifth Circuit, the error, if any, in striking the Petitioners' jury demand was harmless since the case could have been disposed of by directed verdict. *See, e.g., United States v. Williams*, 441 F.2d 637, 644 (5th Cir. 1971) ("this court does not demand jury consideration of an issue which is determinable by directed verdict"); *In Re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982).[5]

Given these arguments made to the Fifth Circuit, the statement in its opinion that "having reviewed the entire record and the applicable law, we find no error in the district court's denial of the Hogues' jury demand" clearly establishes that the questions presented by Petitioners regarding the calculation of time for filing a jury demand were not relevant in the disposition of the case. Petition, A-8. A review of the Fifth Circuit and Trial Court opinions demonstrates that the case was decided on legal rather than factual grounds. In this regard, Petitioners did not appeal to the Fifth Circuit a single relevant fact finding made by the Trial Court, but rather argued that the Trial Court had misapplied the law to the facts. Recognizing this flaw, Petitioners argue that "the denial of the requested jury has resulted in a gross misapplication of state law." Petition, p. 11. The absurdity of this argument is readily apparent. The federal law questions on which Petitioners seek review were not addressed by the

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[5] Of course, in order to determine if a directed verdict would have been proper in this case, this Court would be required to interpret and apply Texas law.

Fifth Circuit and, therefore, are not properly presented for determination given the facts of this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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